

12 July 2024

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Dear Adam and Maureece

**Advice in relation permissibility and FSR matters raised in Council's RFI in relation to DA/2023/334  
Property: 74 Deepwater Road, Castle Cove NSW 2069**

We refer to your request for advice in relation to Council's Request for Information dated 17 May 2024 (RFI) in relation to the Development Application DA-2023/334.

Specifically, you have asked us to advise on the matters raised in Council's RFI including (using Council's numbering):

- (a) Point 9 – Permissibility – *“The Applicant must demonstrate the permissibility of the proposed development (Registered Club) on lot 510 in DP 200636”*; and
- (b) Point 10 – Floor Space Ratio (FSR) – the calculation of FSR having regard to the scope of the proposed development for which consent is sought.

**Summary advice**

In our view having regard to the Development Application documents, applicable legislative provisions and Court's consideration of similar issues, we advise as follows:

- The proposed development is permissible with consent and may lawfully be carried out on the land to which the development application relates.
- Development for the purpose of a Registered Club is expressly permissible on Lot 1, DP 610360 in accordance with clause 2.5 and Schedule 1 of the *Willoughby Local Environmental Plan 2012 (LEP)*.
- Lot 510 DP 200636 is a land titling anomaly. The works proposed to be carried out on Lot 510 DP 200636 involve landscaping works and its use for that purpose is permissible as a 'Recreation area' – being a nominate permissible use within the *R2 - Low density residential zone* pursuant to the LEP.
- Lot 510 could be removed from the proposed development however there are material streetscape and design benefits associated with its inclusion.
- The calculation of the FSR of the proposed development must be carried out in accordance with:

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- the definition of 'gross floor' area contained at clause 82(1) of the Housing SEPP for the ILU units;
  - the definition of gross floor area contained in LEP for the registered club use; and
  - the definition of 'site area' and 'floor space ratio' contained at clause 4.5 of the *Standard Instrument* which is adopted by the LEP.
- The Housing SEPP mandates, at clause 4(2) that "*Unless otherwise defined in this Policy, words used in this Policy, other than in Schedule 1 or 2, have the same meaning as in the standard instrument.*"
  - The calculation of FSR must be carried out in accordance with clause 4.5 of the Standard Instrument, which provides:

(3) **Site area** In determining the site area of proposed development for the purpose of applying a floor space ratio, the **site area** is taken to be—

(a) if the proposed development is to be carried out on only one lot, the area of that lot, or  
 (b) if the proposed development is to be carried out on 2 or more lots, the area of any lot on which the development is proposed to be carried out that has at least one common boundary with another lot on which the development is being carried out.

- The statutory scheme does not permit the calculation of FSR based on a site area that is less than the total area of the lots on which the development is proposed to be carried out.
- The FSR contained in the Ethos Urban SEE has been calculated correctly. There is no legal ability or basis to calculate FSR for future "stratum lots" which are to be created as part of the proposed development or for different uses on the Site. To do so would be an error of law.

## Background

We understand the background facts to be as follows:

1. On 22 December 2023, you lodged Development Application DA-2023/334 with Willoughby Council which seeks consent for consolidation and subdivision of the site to create two lots, demolition of existing golf clubhouse and car park, construction of a new golf clubhouse and associated car parking, construction of part two and three storey building comprising 14 independent living units with basement car parking, bus zone, loading zone, landscaping and associated works at 74 Deepwater Road, Castle Cove.
2. The subject site of the proposed development includes:
  - a. Lot 1 DP 610360 – the existing registered clubhouse
  - b. Lot 510 DP 200636 – a small triangular parcel of land fronting Deepwater Road, shown in Figure 1 below

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Figure 1 – The site's lot boundaries, Source: Civil Plans, Coversheet, C-0000, Issue 03 prepared by Civil Services

3. The existing registered clubhouse is permissible as an additional permitted use on Lot 1 DP 610360 pursuant to clause 2.5 and Schedule 1 of the LEP.
4. The proposed development also seeks consent for the consolidation of Lot 510 DP 200636 into Lot 1 DP 610360, and a Torrens Title subdivision of the existing Lot 1 DP 610360 into the following 2 stratum allotments:
  - a. Lot 1 which will comprise the new clubhouse; and
  - b. Lot 2 which will comprise the independent living units.
5. Two easements are also proposed for right of access and services between the future lots.
6. On 17 May 2024, an RFI was received from Council to which you are preparing an amended package of documents.
7. You have sought our (Mills Oakley) advice in relation to points 9 and 10 of the RFI:

#### 9. Permissibility

As indicated in the pre-da advice, the applicant is required to demonstrate the permissibility of the proposed development as a whole. The submitted advice from Mills Oakley is not relevant to the permissibility issue, it primarily states the lodgement requirements for the application. Additionally, the applicant must demonstrate the permissibility of the proposed development (Registered Club) on lot 510 in DP200636, which also form part of the development site.

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## 10. Floor Space Ratio

The maximum allowable FSR for the site is 0.4:1. The submitted statement and architectural plans accompanying the application indicate an FSR of 0.62:1, which is incorrect. The proposed development comprises two independent uses, which are to be separated through a stratum subdivision, being Lot 1 (Clubhouse) and Lot 2 (ILUs). Therefore, the FSR is to be calculated separately for each use with respect to their allotment size.

Additionally, the GFA calculation for the ILUs does not appear to include a portion of the horizontal corridor located on "Club - Top of Ground Level". Instead, this corridor has been included in the GFA calculation for the Club. The applicant is required to clarify this.

The FSR for the ILUs is calculated as 0.96:1. Variation to the development standard is excessive, resulting in bulk and scale that is not consistent with the surrounding developments and the zone. Additionally, the excessive FSR contributes to inadequate Communal Open Space, Private Open spaces and Deep Soil zones.

It is unlikely that Council will support exceedance of the development standard. Council requests that the proposed building be redesigned to reduce the gross floor area to be more compliant with the maximum floor space ratio control.

Please advise whether any of the above facts are incorrect as this may change our advice.

### Detailed advice

#### 1. Is the proposed development permissible with consent?

1.1 In short, yes.

1.2 The site is zoned R2 Low Density Residential under the LEP.

1.3 The relevant land use objectives and permissible uses for the R2 Zone are set out in the LEP as follows:

##### **"Zone R2 Low Density Residential"**

###### **1 Objectives of zone**

- To provide for the housing needs of the community within a low density residential environment.
- To enable other land uses that provide facilities or services to meet the day to day needs of residents.
- To accommodate development that is compatible with the scale and character of the surrounding residential development.
- To retain and enhance residential amenity, including views, solar access, aural and visual privacy, and landscape quality.
- To retain the heritage values of particular localities and places and to ensure heritage items and conservation areas are not damaged, demolished or otherwise adversely impacted by new development.
- To encourage self sufficiency with respect to energy and food supply.

###### **2 Permitted without consent**

*Home occupations*

###### **3 Permitted with consent**

*Bed and breakfast accommodation; Centre-based child care facilities; Community facilities; Dual occupancies; Dwelling houses; Group homes; Home-based child care; Home businesses; Home industries; Oyster aquaculture; Pond-based aquaculture; **Recreation areas**; Respite day care centres; Roads; Secondary dwellings; Tank-based aquaculture*

###### **4 Prohibited**

**Any development not specified in item 2 or 3"**

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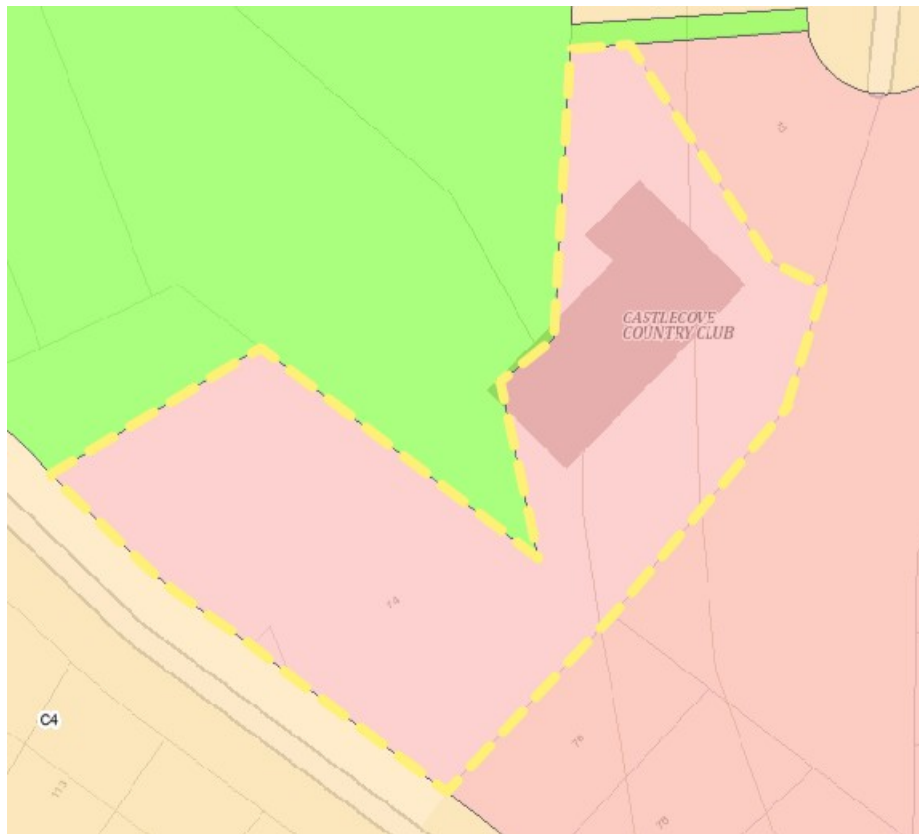


Figure 1 – Land Zoning Map, source NSW Planning Portal Spatial Viewer

- 1.4 The existing registered clubhouse is expressly permissible as an additional permitted use on Lot 1 DP 610360 pursuant to clause 2.5 and Schedule 1 of the LEP:

***“2.5 Additional permitted uses for particular land***

*(1) Development on particular land that is described or referred to in Schedule 1 may be carried out—*

*(a) with development consent, or*

*(b) if the Schedule so provides—without development consent,*

*in accordance with the conditions (if any) specified in that Schedule in relation to that development.*

*(2) This clause has effect despite anything to the contrary in the Land Use Table or other provision of this Plan.”*

***“Schedule 1***

***6 Use of certain land at Castle Cove Country Club, Deepwater Road, Castle Cove***

*(1) This clause applies to land at Castle Cove Country Club, Deepwater Road, Castle Cove, being Lot 1, DP 610360.*

*(2) Development for the purpose of a registered club is permitted with development consent.”*

- 1.5 The proposed seniors housing use for independent living units is permissible on the site pursuant to Part 5, Division 1 of the *State Environmental Planning Policy (Housing) 2021 (Housing SEPP)*:

***“Division 1 Land to which Part applies***

***79 Land to which Part applies***

*This Part applies to land in the following zones—*

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**(a) Zone R2 Low Density Residential,**

**81 Seniors housing permitted with consent**

*Development for the purposes of seniors housing may be carried out with development consent—*

**(a) on land to which this Part applies, or**

**(b) on land on which development for the purposes of seniors housing is permitted under another environmental planning instrument.”**

- 1.6 Accordingly, both components of the proposed development identified in Council’s RFI are expressly permissible with consent.
- 1.7 The Registered Club is permissible with consent pursuant to clause 2.5 and Sch 1 of the LEP and the Seniors Living Component of the development is expressly permissible by virtue of clause 81 of the Housing SEPP.
- 1.8 We understand that Council has requested clarification as to the permissibility of the works and use proposed on Lot 510 DP 200636.
- 1.9 Lot 510 DP 200636 is a titling anomaly and is not subject to the additional permitted use provisions contained within clause 2.5 and Sch 1 of the LEP.
- 1.10 As noted above, Lot 510 DP 200636 is proposed to be consolidated with Lot 1 DP 610360, which will then be subdivided in stratum into two allotments – being 1 allotment for the new clubhouse, and 1 allotment for the independent living units.
- 1.11 The area of Lot 510 DP 200636 is proposed to be contained within the Stratum lot in which the clubhouse is to be contained.
- 1.12 An image of the allotment is provided below.

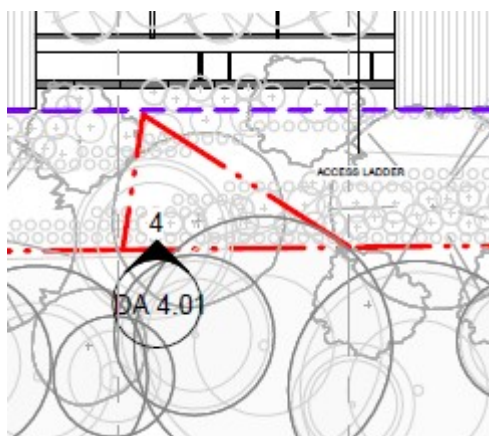


Figure 3 – Architectural plans, Club – Roof Level, DA 3.05, Revision A

- 1.13 The lot is zoned R2 and accordingly, is subject to the permissible uses nominated within the LEP.
- 1.14 Importantly, those nominated permissible uses include “*recreation area*”, being a defined term within the LEP.
- 1.15 *Recreation area* is defined as:  
  
“**recreation area** means a place used for outdoor recreation that is normally open to the public, and includes—  
  
(a) a children’s playground, or

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(b) *an area used for community sporting activities, or*

(c) *a public park, reserve **or garden or the like**.*

*and any ancillary buildings, but does not include a recreation facility (indoor), recreation facility (major) or recreation facility (outdoor)."*

- 1.16 The area contained within Lot 510 DP 200636 is proposed to be landscaped, form part of the planted verge of the property and presents in the form of a garden.
- 1.17 While the area will be located on private property. It's design and operation as a garden at the front of the proposed development in our view, places it squarely within the definition of *recreation area*, being a use which is permissible with consent on the land.
- 1.18 While it is understood that the SEE does not expressly nominate the use of the allotment as recreation area, this can simply be rectified by way of an amendment to the application or updated document which clearly identifies the use of that land.
- 1.19 From a practical perspective, the titling arrangement is an anomaly and there are clear and material benefit of having the area included in the development as a result of streetscape and design outcomes. These outcomes can readily be achieved, on the basis that the area is used for the permissible purpose of a recreation area and treated as such.
- 1.20 To this end, conditions may lawfully be imposed which restrict the ongoing use or future use of Lot 510 DP 200636 for the purpose of a registered club and only for permissible uses identified within the LEP. If required, the area could be fenced or landscaping / landscaped borders added in a sympathetic manner to delineate this and ensure that the area to which the use applied was clearly identifiable.

## **2. How is the FSR for the proposed development required to be calculated?**

- 2.1 The FSR of the proposed development must be calculated in accordance with the applicable legislative provisions which apply to the proposed development, and which are very clear about the way in which it is to be determined.
- 2.2 As a result of the two different environmental planning instruments which apply to the uses proposed on the Site, there is a distinction between the way *gross floor area* is to be calculated for each of the proposed buildings however, the overall calculation of FSR which applies to the Site must adopt the calculation regime contained within the LEP.
- 2.3 Council's RFI identifies that the FSR ought to be calculated separately for each use (Lot 1 (clubhouse) and Lot 2 (ILUs) with respect to their future stratum allotment size, as they are independent uses and are to be separated through a stratum subdivision as sought in the Development Application. This approach may not lawfully be adopted.
- 2.4 Such an interpretation of the calculation of FSR is inconsistent with the provisions in clause 4.5 of the LEP and the requirements under the Housing SEPP.
- 2.5 The Housing SEPP makes express provision for the calculation of *gross floor area* to which the provisions relation to Seniors Housing under that Part apply.
- 2.6 Specifically, it provides for a definition of *gross floor area* which is different to that which is contained within the Standard Instrument. It provides:

### **"82 Definitions**

(1) *In this Part—*

***gross floor area*** means the sum of the floor area of each floor of a building measured from the internal face of external walls, or from the internal face of walls separating the building from another building, measured at a height of 1.4m above the floor—

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(a) *excluding the following—*

- (i) *columns, fin walls, sun control devices and elements, projections or works outside the general lines of the internal face of an external wall,*
- (ii) *cooling towers, machinery and plant rooms, ancillary storage space and vertical air conditioning ducts,*
- (iii) *car parking and internal access to the car parking,*
- (iv) *space for the loading and unloading of goods, including access to the space,*
- (v) *areas for common vertical circulation, including lifts and stairs,*
- (vi) *storage, vehicular access, garbage and services within the basement,*
- (vii) *for a residential care facility—floor space used for service activities provided by the facility within the basement,*
- (viii) *terraces and balconies with outer walls less than 1.4m high,*
- (ix) *voids above a floor at the level of a storey or storey above, and*

(b) *for in-fill self-care housing—including car parking provided at ground level, other than for visitors, in excess of 1 per dwelling.”*

2.7 Relevantly, the Housing SEPP does not include definitions of *floor space ratio* or *site area*.

2.8 As a result, clause 4(2) of the Housing SEPP operates to require those terms to be read in accordance with the *standard template* definitions. That provision provides:

*“(2) Unless otherwise defined in this Policy, words used in this Policy, other than in Schedule 1 or 2, have the same meaning as in the standard instrument.”*

2.9 The terms of the *Standard Instrument* are reflected in the LEP, which define *floor space ratio* and *site area* at clause 4.5 as follows:

*“(2) **Definition of “floor space ratio”** The floor space ratio of buildings on a site is the ratio of the gross floor area of all buildings within the site to the site area.*

*(3) **Site area** In determining the site area of proposed development for the purpose of applying a floor space ratio, the site area is taken to be—*

- (a) if the proposed development is to be carried out on only one lot, the area of that lot, or*
- (b) if the proposed development is to be carried out on 2 or more lots, the area of any lot on which the development is proposed to be carried out that has at least one common boundary with another lot on which the development is being carried out.”*

2.10 Importantly, clause 4.5 expressly adopts a different definition of *site area* to that contained in, and defined by, the dictionary to the LEP. This reflects the way in which that term is to be read for the specific purpose of calculating FSR. This is confirmed by the note below the dictionary definition of *site area* which reads as follows:

**“Note—**

*The effect of this definition is varied by clause 4.5 for the purpose of the determination of permitted floor space area for proposed development.”*

2.11 The practical difference is that it does not permit the limitation of the site area to that “part” of the lot being developed, but requires the FSR calculation to be assessed against the total area of the Lot on which the proposed development is to take place.

2.12 **Clause 4.5(3)(a) requires that the whole area of the lot (or lots) is to be used for the calculation of site area when determining FSR**, as opposed to, as Council have expressed in their RFI, calculating the FSR separately according to the *“two independent uses which are to be separated through a stratum subdivision”*.

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- 2.13 As a result of the above definitions, which apply to the calculation of floor space ratio for both the ILUs and registered club premises, the only lawful way to calculate a floor space ratio is by reference to the totality of the *site area* as defined by clause 4.5 of LEP.
- 2.14 There is no legal basis on which the FSR of the independent uses, or areas of future stratum lots can be relied upon to calculate *floor space ratio*.
- 2.15 The applicable legislative provisions are clear and unequivocal and require that the total *site area* be used in order to calculate the FSR of the proposed development.

*Calculating the correct FSR of the proposed development*

- 2.16 As a result of the proposed development requiring the application of two different definitions to different buildings on the Site, the exercise does become tricky, however, the terms of the legislation are clear in what they require.
- 2.17 To this end, the Housing SEPP is clear – it requires the FSR of the ILU component of the development not to exceed 0.5:1 (being a non discretionary development standard in clause 108(2)(c) of the Housing SEPP).
- 2.18 When calculated in accordance with the definition, using a site area of 5,721m<sup>2</sup> and a *gross floor area* of the ILU building calculated in accordance with the Housing SEPP definition at cl 82, the ILU building has an FSR of 0.45:1.
- 2.19 Accordingly, the ILU component of the development complies with the non discretionary development standard within clause 108(2)(c) of the Housing SEPP.
- 2.20 Subsequently, a floor space ratio calculation must also be carried out for the buildings on the site which are not subject to the definition of GFA contained in the Housing SEPP.
- 2.21 Accordingly, the GFA definition contained within LEP is to be applied to the registered club buildings to derive a total GFA number for the buildings on the Site.
- 2.22 This GFA number is then to be applied as a ratio against the total *site area*, as that term is defined by clause 4.5(3) of LEP.
- 2.23 As a result, the total GFA on the Site is 3,564.78m<sup>2</sup>.
- 2.24 This includes the GFA of the ILU building – calculated in accordance with the Housing SEPP as well as the GFA of the registered club building, calculated in accordance with the LEP definition.
- 2.25 Although complex, the terms of the applicable legislative provisions are clear and mandate that the *site area* used for the purpose of calculating FSR be determined in accordance with clause 4.5(3) of LEP and the blended *gross floor area* be provided as a ratio against that **total** area of the lots.
- 2.26 In our view, there is no legal mechanism or ability to determine the potential future FSR of stratum lots to be provided. Even if the stratum lots were in place, clause 4.5 of LEP would require the floor space ratio to be determined by reference to the total site area in any event - excluding any double counting of areas of the strata subdivision which overlapped (see clause 4.5(5) LEP).
- 2.27 The FSR of the proposed development must be determined in accordance with the two applicable *gross floor area* definitions and the calculation of site area in accordance with clause 4.5 of LEP.
- 2.28 Floor space ratio must be determined with the applicable legislative provisions. Those provisions require that the total *site area* be considered when calculating FSR – despite

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the *gross floor area* definitions differing between the two buildings proposed.

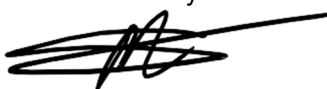
### 3. Conclusion

3.1 In response to the matters raised in Council's RFI, we confirm that:

- (a) The proposed development is permissible with consent, including Lot 510 DP 200636 which is proposed to be used as a 'recreation area' and not affiliated with the registered club; and
- (b) The FSR for the proposed development has been calculated correctly in accordance with the provisions in clause 4.5 of the LEP and clause 108(2)(c) of the Housing SEPP.

If you have any questions, please call Matt Sonter on direct line (02) 8035 7850 or [msonter@millsoakley.com.au](mailto:msonter@millsoakley.com.au) or Kate Marginson on direct line (02) 8035 7851 or [kmarginson@millsoakley.com.au](mailto:kmarginson@millsoakley.com.au).

Yours sincerely



Matt Sonter  
Partner

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